RECORD AND BRIEFS

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Exceptions To The Special Master's Report

BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF THE STATE OF TEXAS' REPLY TO EXCEPTIONS REGARDING THE FIRST INTERIM REPORT OF THE SPECIAL MASTER AND IN SUPPORT OF CERTAIN EXCEPTIONS OF THE UNITED STATES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

INTEREST OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 6

SUMMARY OF ARGUMENT 10

ARGUMENT 12

1. The Court should reject the arguments of New Mexico, Colorado, and New Mexico *amici* that the Court selectively disregard the Special Master's rationale supporting his recommendation to deny New Mexico's motion to dismiss the Texas Complaint 12

   a. The Parties accede to the Special Master's recommendation and the requests to disregard the conclusions underlying the recommendation are procedurally infirm 12

   b. New Mexico has no jurisdiction over Compact water delivered into Elephant Butte, which becomes water dedicated to the Project for release and delivery to EPCWID, EBID, and Mexico 15

   c. The Report is consistent with state and federal law including Section 8 of the Reclamation Act 17

TABLE OF CONTENTS – Continued

Page

d. Because New Mexico accedes to the Special Master's recommendation, the exceptions of New Mexico *amici* should be disregarded 19

2. The Special Master's conclusions and recommendations do not implicate *Colorado River* abstention or the McCarran Amendment, and the general stream adjudication in New Mexico remains an inadequate forum to fully resolve claims relating to Rio Grande Project rights 21

3. New Mexico and its *amici* misunderstand and fundamentally mischaracterize the Operating Agreement 28

4. The U.S. Complaint states claims under the Rio Grande Compact based on the interrelated nature of the Rio Grande Project and the Compact, but not because the United States has unilateral operational control of the Project 32

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546 (1963).....18, 19

Arizona v. California, 460 U.S. 605 (1983).....24

Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545 (1983) 25

Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942).....27

California v. United States, 438 U.S. 645 (1978) 18

Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).....23

Dugan v. Rank, 372 U.S. 609 (1963).....25

El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso, 133 F. Supp. 894 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957).....7

El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist., No. EP07CA0027 (W.D. Tex. Jan. 22, 2007).....9, 28

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).....17, 27

In re: Adjudication of all Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Tex.) Segment of the Rio Grande Basin, No. 2006-3291 (327th Jud. Dist. Tex., Oct. 30, 2006) 9

Kansas v. Nebraska, 135 S. Ct. 1042 (2015).....13

Kansas v. Nebraska, 527 U.S. 1020 (1999).....17

TABLE OF AUTHORITIES – Continued

Page

Maryland v. Louisiana, 451 U.S. 725 (1981) 33

Montana v. Wyoming, No. 137 Orig., First Interim Report of the Special Master (Feb. 10, 2010) 25

Nebraska v. Wyoming, 515 U.S. 1 (1995) 17

Strawberry Water Users Ass'n v. United States, 576 F.3d 1133 (10th Cir. 2009) 18

Stockton E. Water Dist. v. United States, 583 F.3d 1344 (Fed. Cir. 2009) 18

Texas v. New Mexico, 462 U.S. 554 (1963) 24

United States v. City of Las Cruces, 289 F.3d 1170 (10th Cir. 2002) 19, 27, 28

United States v. Elephant Butte Irrigation Dist., 97-cv-00803 JAP-RLP (Aug. 15, 2002) 28

Wyoming v. Colorado, 259 U.S. 419 (1922) 19

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES

U.S. Const. amend. X 25

Tex. Const. art. XVI, § 59 7

Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (May 21, 1906) 8

Act of Oct. 30, 1992, Pub. L. No. 102-575, § 3301, 106 Stat. 4600 9

Enabling Act, 61 Pub. L. No. 219, ch. 310, 36 Stat. 557 (June 20, 1910) 18

TABLE OF AUTHORITIES – Continued

Page

Reclamation Act of 1902, 57 Pub. L. No. 161, 32 Stat. 388 (June 17, 1902) 8, 17

Rio Grande Compact, Act of May 31, 1939, 76 Pub. L. No. 96, ch. 155, 53 Stat. 785 ..... *passim*

Rio Grande Project Act, Act of Feb. 25, 1905, 58 Pub. L. No. 104, ch. 798, 33 Stat. 814 7

28 U.S.C. § 1251 4

43 U.S.C. § 521 7

43 U.S.C. § 383 ..... 16, 19

43 U.S.C. § 666 23

Tex. Water Code § 55.185 8

Tex. Water Code § 55.364 7

RULES

Sup. Ct. R. 17 13

Sup. Ct. R. 37 1

Fed. R. Civ. P. 12 13

OTHER AUTHORITIES

Contract between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) 8

Ground-Water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico, Geological Survey Paper 1230 (1954) 30

TABLE OF AUTHORITIES – Continued

Page

Operating Agreement for the Rio Grande Project (March 10, 2008) ..... *passim*

Texas Commission on Environmental Quality Certificate of Adjudication No. 23-5940 (March 7, 2007) 9, 26, 34

Water Resources of the Rincon and Mesilla Valleys and Adjacent Areas, New Mexico, New Mexico State Engineer Technical Report 43 (1981) 30

BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF THE STATE OF TEXAS' REPLY TO EXCEPTIONS REGARDING THE FIRST INTERIM REPORT OF THE SPECIAL MASTER AND IN SUPPORT OF CERTAIN EXCEPTIONS OF THE UNITED STATES

This *amicus curiae* brief by El Paso County Water Improvement District No. 1 ("EPCWID" or "the District"), a political subdivision of the State of Texas, is filed by its authorized law officer in support of the State of Texas' reply to exceptions regarding the First Interim Report of the Special Master and certain of the exceptions filed by the United States to the Report, pursuant to Supreme Court Rule 37.[1]

INTRODUCTION

In this Original Action, the State of Texas seeks to enforce against the State of New Mexico the terms of the Rio Grande Compact ("Compact"), signed by the States of Colorado, New Mexico, and Texas on March 18, 1938, and ratified by Congress pursuant to the Act of May 31, 1939, 76 Pub. L. No. 96, ch. 155, 53 Stat. 785. Subsequent to Texas' filing of its Motion for Leave to File Complaint on January 8, 2013, the United States

[1] EPCWID files this brief pursuant to Supreme Court Rule 37.4. Notice to counsel of record for all parties was provided pursuant to Rule 37.2(a).

moved to intervene and file a Complaint in Intervention. The Complaint in Intervention seeks to require New Mexico to comply with its obligations under the Compact as it relates to the Rio Grande Reclamation Project ("Rio Grande Project" or "Project"), an interstate United States Bureau of Reclamation project which provides Texas its Rio Grande Compact entitlement. On January 27, 2014, the Court granted Texas leave to file its Complaint ("Texas Complaint"), with the right of New Mexico to file a motion to dismiss. On March 31, 2014, the Court granted the United States' Motion to Intervene and allowed the filing of the United States Complaint in Intervention ("U.S. Complaint"). New Mexico filed a motion to dismiss both the Texas Complaint and the U.S. Complaint on April 30, 2014. The Court referred New Mexico's motion to dismiss to Special Master A. Gregory Grimsal for resolution. The Court subsequently referred to the Special Master two motions to intervene, including that filed by EPCWID.

On March 20, 2017, the Court received and ordered filed the First Interim Report of the Special Master ("Report"), which recommends denial of New Mexico's motion to dismiss the Texas Complaint and denial in part of New Mexico's motion to dismiss the U.S. Complaint.[2] Regarding New Mexico's motion to

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[2] The Special Master recommends denial of the motions to intervene of Elephant Butte Irrigation District ("EBID") and EPCWID. This brief does not address the Special Master's recommendations on the motions to intervene. As Colorado notes, consideration of the United States' claims will require the participation of EPCWID and EBID. State of Colorado's Exceptions to

dismiss the Texas Complaint, the Special Master properly finds that "Texas has stated plausible claims for New Mexico's violation of the 1938 Compact," Report 217; that the Rio Grande Project forms the basis for Texas' Compact rights, *e.g.*, Report 203-09; that New Mexico's delivery obligation into Elephant Butte Reservoir requires New Mexico to relinquish dominion and control of delivered water, Report 195-98; that New Mexico may not evade its Compact obligations by delivering water into Elephant Butte Reservoir and then allowing the depletion of that water upon release for non-Project water uses in New Mexico, Report 200-02; that because water delivered to the Project is Compact water, federal, not state, law applies to releases, delivery, and protection of Project water supply, Report 216-17; and that New Mexico lacks jurisdiction over Project water supply which includes Texas' Compact apportionment, Report 216.

Regarding the U.S. Complaint, the Special Master concludes, although the Rio Grande Project serves as the sole method of apportionment of Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir, the United States did not state a Compact claim because it is not a party to the Compact and the Compact makes no specific apportionment of water to the United States. Report 231. The Special Master

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the First Interim Report of the Special Master 9. EPCWID intends to actively participate in these proceedings as an *amicus curiae*, as specifically contemplated by the Special Master, Report 278, and reserves the right to renew its motion to intervene as the case develops.

concludes the United States did state claims under federal Reclamation law, and that because of the interrelationship of the Compact and Project, such claims should be decided together with the Texas Compact claims through this Court's exercise of its jurisdiction under 28 U.S.C. § 1251(b)(2). Report 237.

No party takes exception to the Special Master's recommendation that New Mexico's motion to dismiss the Texas Complaint be denied, that Texas has stated claims for New Mexico's violations of the Compact, and that the case should proceed before the Special Master to determine the specific nature and extent of those violations. Instead, New Mexico and Colorado, while agreeing the Texas Complaint should proceed, take exception to specific portions of the Special Master's rationale supporting the Report's recommendations. State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support ("New Mexico Brief") 16; State of Colorado's Exceptions to the First Interim Report of the Special Master ("Colorado Brief") 9. Four *amici curiae*, New Mexico State University ("NMSU"), New Mexico Pecan Growers ("NMPG"), City of Las Cruces, and Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"), filed exceptions ostensibly in support of New Mexico (collectively "New Mexico *amici*"), arguing the Special Master's rationale should be rejected and that the Special Master failed to sufficiently consider additional issues in arriving at his recommendation. Motion for Leave to File and Brief of *Amicus Curiae* New Mexico State University in Support of Defendant

State of New Mexico ("NMSU Brief"); Motion for Leave to File and Brief of *Amicus Curiae* New Mexico Pecan Growers in Support of Defendant State of New Mexico ("NMPG Brief"); City of Las Cruces' *Amicus Curiae* Brief in Support of State of New Mexico's Exceptions to the First Interim Report of the Special Master ("Las Cruces Brief"); and Albuquerque Bernalillo County Water Utility Authority's *Amicus Curiae* Brief in Support of State of New Mexico's Exceptions to the First Interim Report of the Special Master ("ABCWUA Brief"). The Court should reject the exceptions filed by New Mexico, Colorado, and the New Mexico *amici*, adopt the Report of the Special Master with regard to denial of the motion to dismiss the Texas Complaint, and remand this case to the Special Master for proceedings on the Texas Complaint consistent with the Report.

EPCWID supports, with limitations as discussed herein, the Exception of the United States and Brief for the United States in Support of Exception ("U.S. Brief"). With regard to the U.S. Complaint, the Court should adopt the Report of the Special Master that the U.S. Complaint be allowed as to claims under Reclamation law, reject the recommendation of the Special Master that the U.S. Complaint failed to state a claim under the Compact, and direct all claims of the U.S. Complaint to be heard by the Special Master.

INTEREST OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

The case brought to this Court by Texas and the United States is vital to protect and preserve the water supply of EPCWID, the Texas beneficiary of the Rio Grande Project and the recipient of Texas' Rio Grande Compact apportionment. New Mexico's continuing Compact violations, set forth in both the Texas Complaint and the U.S. Complaint, directly affect the Project water supply to which EPCWID is entitled.

EPCWID has submitted two prior *amicus curiae* briefs in this action, Brief of *Amicus Curiae* El Paso County Water Improvement District No. 1 in support of State of Texas' Motion to File Complaint (March 11, 2013) ("EPCWID Motion to File Complaint Brief"), and Brief of *Amicus Curiae* El Paso County Water Improvement District No. 1 in support of State of Texas and United States in Opposition to New Mexico's Motion to Dismiss Texas' Complaint and the United States Complaint in Intervention (June 16, 2014). As set forth in those briefs and herein, EPCWID is one of two beneficiaries of the Rio Grande Project, the cornerstone of the Rio Grande Compact and the vehicle through which Texas, through delivery to EPCWID, receives its Compact apportionment.[3]

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[3] The Special Master recognized the benefit of allowing both EBID and EPCWID to participate as *amicus curiae* in light of their respective unique capacities as beneficiaries of the Rio Grande Project. Report 267, 277-78.

EPCWID is a political subdivision of the State of Texas, organized under the Texas Constitution. Tex. Const. art. XVI, § 59(b); *see El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) (stating EPCWID is a Texas political subdivision and "is fashioned to perform public service and duties of high importance to the welfare of the people of Texas"). EPCWID was organized to "distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract." Tex. Water Code § 55.364. The District provides water for irrigation and municipal uses (pursuant to contracts approved by the Secretary of Interior, in accordance with 43 U.S.C. § 521). There are 69,010 acres of lands within EPCWID classified as irrigable. EPCWID provides, on average, over fifty percent of the annual water supply of the City of El Paso from the District's allocation of Rio Grande Project water. Located in a part of the United States with an average rainfall of eight inches per year, EPCWID's users are dependent on Rio Grande water apportioned to Texas under the Compact, and allocated to the District through the Project.

The Rio Grande Project was authorized by Congress in 1905 for the purpose of supplying irrigation water to EBID in southern New Mexico and EPCWID in western Texas (collectively "the Districts"), and, pursuant to international treaty, to Mexico. *See* Act of Feb.

25, 1905, 58 Pub. L. No. 104, ch. 798, 33 Stat. 814 ("Rio Grande Project Act") (extending the Reclamation Act of 1902, 57 Pub. L. No. 161, 32 Stat. 388 (June 17, 1902) (codified as amended at 43 U.S.C. § 371, *et seq.*) ("Reclamation Act") to Texas, and authorizing the construction of Elephant Butte Dam to provide water for irrigation in Texas and New Mexico); Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (May 21, 1906). The Rio Grande Compact was designed to ensure the Project remained viable by requiring New Mexico's Compact deliveries into the Project at Elephant Butte Reservoir, where the water delivered would become "usable" water for the Project, Rio Grande Compact Art. I(*l*), to be allocated and delivered to the Project beneficiaries, EBID and EPCWID. Neither the Compact nor the Project allowed for or contemplated the diminishment of delivered usable Project water below Elephant Butte by New Mexico for non-Project water uses.

EPCWID provides water to its users pursuant to its authority under Texas law and contracts with the Bureau of Reclamation. *See* Tex. Water Code § 55.185 (authorizing EPCWID to enter into contracts with the Bureau of Reclamation). These contracts concern allocation, delivery, and repayment costs related to EPCWID's water from the Rio Grande Project. EPCWID has a February 16, 1938 contract with EBID, approved by the United States which provides, in part, that 67/155th of the Rio Grande Project water is to be

distributed to EPCWID, and 88/155th to EBID.[4] This contract was signed a month prior to the March 18, 1938 Rio Grande Compact as a necessary precursor to the Compact. EPCWID has reimbursed the United States for EPCWID's share of the United States' reimbursable Project construction costs and now holds title to most of the Project works within its boundaries. *See* Act of Oct. 30, 1992, Pub. L. No. 102-575, § 3301, 106 Stat. 4600, 4705-06 ("Title Transfer"). EPCWID was decreed a water right in the State of Texas for its water supply from the Project which it holds jointly with the United States. *See In re: Adjudication of all Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Tex.) Segment of the Rio Grande Basin*, No. 2006-3291 (327th Jud. Dist. Tex., Oct. 30, 2006) (as set forth in Texas Commission on Environmental Quality Certificate of Adjudication No. 23-5940 (March 7, 2007) ("Certificate of Adjudication")).[5]

In 2007, EPCWID filed suit in the Western District of Texas, against EBID and the Bureau of Reclamation, to enforce the obligations of the United States to allocate and deliver EPCWID's Project water. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist.*, No. EP07CA0027 (W.D. Tex. Jan. 22, 2007). EPCWID requested the court declare the contractual obligations of the United States and compel the United States to allocate and deliver Project

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[4] The contract is reprinted in the appendix to the Brief for the United States as Amicus Curiae (Dec. 10, 2013).

[5] The Certificate of Adjudication is reprinted in the appendix to the EPCWID Motion to File Complaint Brief.

water in accordance with the Rio Grande Project Act and the contracts between and among EPCWID, EBID, and the United States. The litigation culminated in a settlement agreement in 2008 that included an operating agreement for the Project ("Operating Agreement").[6] The Operating Agreement establishes a method for the allocation of water among EBID, EPCWID, and Mexico, and provides mechanisms for coordination among the Districts and Reclamation with regard to Project operations. Pursuant to the Operating Agreement, the Districts participate in the operation of the Project through coordination with Reclamation regarding allocation, release, distribution, and delivery of the Project water supply essential to both districts. New Mexico's violations of the Rio Grande Compact, by allowing depletions of Project water in New Mexico below Elephant Butte Reservoir to which EBID, EPCWID, and Mexico are entitled, and New Mexico's interference with the operation of the Project by the United States has, and will continue to have, detrimental effects on the continued viability of the Rio Grande Project and the Operating Agreement.

SUMMARY OF ARGUMENT

The Court should adopt the Report in full as it relates to New Mexico's motion to dismiss the Texas Complaint. New Mexico, Colorado, and the New

[6] The Operating Agreement is available at https://www.usbr.gov/uc/albuq/rm/RGP/pdfs/Operating-Agreement2008.pdf.

Mexico *amici* do not take exception to the Special Master's recommendation that New Mexico's motion to dismiss should be denied and that this case should proceed before the Special Master on Texas' Complaint. Rather, they argue the Court should ignore the Special Master's conclusions and determinations which support the recommendations. The Court should reject this approach as procedurally infirm and legally unsupported. Additionally, the Court should reject the arguments of New Mexico and New Mexico *amici* that the New Mexico general stream adjudication is an adequate forum to resolve the intertwined Compact and Project claims of Texas and the United States. This Court has exclusive jurisdiction to determine those claims. Finally, the Court should disregard the erroneous statements of New Mexico and its *amici* regarding the Operating Agreement, a binding agreement among the United States, EPCWID, and EBID which provides a sound basis under which EPCWID receives its appropriate allocation of Project water supply despite New Mexico's continuing Compact violations.

With regard to the Special Master's recommendation on New Mexico's motion to dismiss the U.S. Complaint, the Report correctly concludes that the United States' claims based on Reclamation law should be determined with the claims of Texas regarding violations of the Rio Grande Compact. However, the U.S. Complaint also states claims for Compact violations based on the interrelation of the Compact and the Rio Grande Project, and the obligation of the United States to effectuate delivery of Texas' Compact water to

EPCWID. While the United States is not apportioned a specific amount of water under the Compact, the Project's allocation to EPCWID serves as Texas' Compact apportionment, and thus the United States properly asserts claims against New Mexico for Compact violations which interfere with the United States' operation of the Project, for the benefit of and in cooperation with EPCWID and EBID, in accordance with the Operating Agreement.

ARGUMENT

1. The Court should reject the arguments of New Mexico, Colorado, and New Mexico *amici* that the Court selectively disregard the Special Master's rationale supporting his recommendation to deny New Mexico's motion to dismiss the Texas Complaint.

a. The Parties accede to the Special Master's recommendation and the requests to disregard the conclusions underlying the recommendation are procedurally infirm.

The Special Master properly concludes that Texas has stated claims under the Rio Grande Compact. In so concluding, the Special Master soundly rejects New Mexico's argument that New Mexico has no Compact obligations once it delivers water into Elephant Butte Reservoir: "it is unfathomable to accept that Texas 'would trade away its right to the Court's equitable

apportionment' had it contemplated then that New Mexico would be able to disown its obligations under the 1938 Compact and simply recapture water it delivered to the Project, destined for Texas, upon its immediate release from the Reservoir." Report 209 (quoting *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015)). New Mexico unequivocally states it "accedes to the recommendation of the Special Master that its Motion to Dismiss the Texas Complaint be denied" and that it "recognizes that the case will move forward to resolve claims among Texas, New Mexico, and the United States," New Mexico Exceptions 1, but at the same time argues for rejection of the fundamental underpinnings of the Report which support denial of New Mexico's motion to dismiss the Texas Complaint.[7]

The Special Master's recommendation to deny New Mexico's motion to dismiss the Texas Complaint, as well as the rationale and conclusions underlying that recommendation, should be adopted by the Court. Contrary to the protestations of New Mexico and New Mexico *amici*, the Special Master made no findings and drew no conclusions other than those necessary to determine the motion to dismiss.[8] The Special Master's

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[7] New Mexico's *amicus* City of Las Cruces argues that the Report "exceeds the scope of [Fed. R. Civ. P.] 12(b)(6)." Las Cruces Brief 15. This argument is meritless because, in original actions, the Supreme Court, and the Special Master, are not confined by the Federal Rules of Civil Procedure. The *form* of motions is required to conform to the Federal Rules of Civil Procedure, Sup. Ct. R. 17.2, but beyond that, the Rules serve only as "guides," *id.*

[8] Ironically, it was New Mexico which put before the Special Master on its motion to dismiss hundreds of pages and a myriad

legal rationale and factual conclusions cannot be separated from his recommendation that New Mexico's motion to dismiss the Texas Complaint be denied. To the extent there are concerns with regard to the specifics of the Special Master's conclusions, the remedy is not for this Court to reject the Special Master's Report. Rather, any concerns or questions regarding the import of the conclusions underlying the Report's recommendation should be addressed by the Special Master as this matter proceeds before him, as all parties now agree it should.

Colorado, like New Mexico, agrees that the recommendation of the Special Master denying the motion to dismiss the Texas Complaint should be adopted by the Court. Colorado Brief 2. However, Colorado, like New Mexico, urges the Court not to adopt the underlying rationale which supports the Special Master's conclusions. The conclusions of the Special Master relate to a threshold determination regarding the motion to dismiss, in which New Mexico argued that Texas had failed to state a claim under the Compact and provided extensive (albeit unsupportable) rationale for why no claim was stated. The Special Master properly rejects New Mexico's position and in so doing provides the underlying rationale for his determination. The Court should adopt the Report in its entirety with regard to the denial of New Mexico's motion to dismiss the Texas

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of citations to historical and other information relating to the Compact and the Project. *See, e.g.*, New Mexico's brief in support of its motion to dismiss (April 30, 2014), App. 1-44, and lodging request by New Mexico (May 8, 2014).

Complaint and remand the case to the Special Master for further proceedings consistent with that Report.

b. New Mexico has no jurisdiction over Compact water delivered into Elephant Butte, which becomes water dedicated to the Project for release and delivery to EPCWID, EBID, and Mexico.

New Mexico now agrees that the Court should allow the case to proceed before the Special Master. Yet, New Mexico continues to reargue the legal issues presented in support of its motion to dismiss, which were fully considered and rejected by the Special Master. Specifically, New Mexico continues to dispute that Texas has stated a Compact claim, because the Compact requires New Mexico to deliver water into Elephant Butte Reservoir and thereby relinquish control of that water to the Project for delivery to EBID and EPCWID. New Mexico Brief 16, 31. Despite its concession that Texas states a Compact claim and that the matter should proceed before the Special Master, New Mexico continues to argue it should be allowed to deliver water under the Compact and then retrieve that water upon release from Elephant Butte dam. *See, e.g.*, New Mexico Brief 19. New Mexico simply has reformulated its untenable position which the Special Master rejected as "unfathomable." Report 209.

Contrary to New Mexico's arguments, neither the Special Master's recommendation that the motion to dismiss the Texas Complaint be denied, nor his

underlying rationale "strips New Mexico of its sovereign authority over water within the State" or conflicts with Section 8 of the Reclamation Act, 43 U.S.C. § 383, or any other aspect of federal or state law. New Mexico Brief 16, 23. These arguments, as well as New Mexico's argument that the Special Master's recommendation unlawfully deprives New Mexico of jurisdiction over the water apportioned under the Compact, ignore the fundamental and correct premise that the Compact water New Mexico delivers into Elephant Butte is thereafter committed to the Rio Grande Project (EBID and EPCWID), and not available to New Mexico water users. *See* Compact Art. I(*l*) (defining usable water).

The Special Master properly concluded that New Mexico lacks jurisdiction to allocate or administer the waters below Elephant Butte in a manner which allows New Mexico to determine what share of Project water goes to Texas and therefore to EPCWID. New Mexico appears to argue that when it signed the Rio Grande Compact, it retained jurisdiction within the Project and below Elephant Butte to not only allocate and administer rights in New Mexico, if any, which may be allowed by the Compact, but to decide, in its estimation and judgment, the quantity of water to which Texas is entitled under the Compact. New Mexico seeks of the Court the imposition of a legal regime akin to the fox watching the hen house, and this ongoing stance by New Mexico is exactly why Texas invoked this Court's original jurisdiction to enforce the terms of the Rio Grande Compact. After execution of the Compact, New Mexico was not left with jurisdiction or

sovereignty to determine what Texas receives under the Compact. Under the plain terms of the Compact, that is the function of the Project, now determined through the Operating Agreement.

It is not a novel proposition that subsequent to apportionment of an interstate stream, one state does not determine as an intrastate matter what amount of water the downstream compacting state is permitted to receive. *See Kansas v. Nebraska*, 527 U.S. 1020 (1999) (compact can restrict intrastate consumptive use of state water resources); *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995) (compacting state can assert claim to restrict intrastate use of water); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (rights of state water uses subordinated to compact obligations). New Mexico's effort to claim control of Project water, and adjudicate and administer Project water under state law, is unavailing. Project waters are dedicated to the Compact and the rights and obligations of New Mexico, Texas, and the United States must be determined in this Court pursuant to federal law.

c. The Report is consistent with state and federal law including Section 8 of the Reclamation Act.

The Special Master's sound conclusions with regard to the meaning and functioning of the Rio Grande Compact and the Rio Grande Project do not conflict with Section 8 of the Reclamation Act of 1902. New

Mexico's and New Mexico *amici*'s reliance on Section 8 as a basis to disregard the Special Master's legal conclusions is flawed because it ignores the significant jurisprudence that directs state law applies to federal Reclamation projects only to the extent state law is not inconsistent with federal law or does not otherwise thwart other federal purposes. *See California v. United States*, 438 U.S. 645, 662 (1978); *Arizona v. California*, 373 U.S. 546, 587-88 (1963) (states may do nothing inconsistent with the Project Act or with federal control of the river). It is also clear that federal, not state, law applies to the determination of the rights and obligations of the United States in Reclamation project contracts. *See Strawberry Water Users Ass'n v. United States*, 576 F.3d 1133, 1147 (10th Cir. 2009) (obligations and rights of the United States under its contracts governed exclusively by federal law); *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1361-62 (Fed. Cir. 2009) (United States obligated to make deliveries under the terms of federal Reclamation contracts). Here, the Compact directs New Mexico to deliver Texas' Rio Grande Compact water to the Project, which becomes usable Project water supply. Compact, Art. I(*l*). That water does not thereafter lose its character as Compact water destined for Texas and its disposition is governed by federal, not state, law. New Mexico's efforts to assert jurisdiction over Project water dedicated to Texas under the Compact would thwart the federal purpose of the Project and of the congressionally approved Compact. *See also* Enabling Act, 61 Pub. L. No. 219, ch. 310 § 2(7), 36 Stat. 557, 559 (June 20, 1910) (New Mexico accepted the permanent

retention by the United States of "all rights and powers for the carrying out of the provisions" of the Reclamation Act).

New Mexico and New Mexico *amici* also ignore that Section 8 has a specific exemption regarding the rights of the United States "in, to or from any interstate stream." 43 U.S.C. § 383; *see Wyoming v. Colorado*, 259 U.S. 419, 463 (1922) (stating that, in drafting Section 8, Congress intended interstate streams that were the subject of litigation before the Supreme Court be excepted from application of state law); *Arizona v. California*, 373 U.S. at 623 (in Section 8, "Congress intended to leave untouched the law of interstate equitable apportionment"); *see also United States v. City of Las Cruces*, 289 F.3d 1170, 1184 (10th Cir. 2002) ("Quiet Title Case") (exemption did not apply because "the instant federal action does not involve an interstate equitable apportionment dispute").

d. Because New Mexico accedes to the Special Master's recommendation, the exceptions of New Mexico *amici* should be disregarded.

Purporting to support New Mexico's exceptions to the Report, New Mexico's *amici* in fact challenge the Special Master's ultimate recommendation regarding the motion to dismiss Texas' Complaint. *Amici* City of Las Cruces and ABCWUA, while stating they support New Mexico's exceptions, appear to argue for rejection of the Special Master's sound conclusion that Texas

has stated claims for New Mexico's Compact violations. Las Cruces Brief 21-29 (arguing that Texas' Complaint is barred by the doctrine of laches); ABCWUA Brief 24 (suggesting that Texas failed to state a claim under the Compact). This is not a position taken or supported by New Mexico or Colorado and should be rejected on that basis alone.

NMSU and NMPG argue the Special Master failed to consider the extent of groundwater development in New Mexico below Elephant Butte in arriving at his recommendation. NMSU Brief 6; NMPG Brief 8. This is ironic, as the thrust of their argument is otherwise that the Special Master should not have considered any extrinsic evidence or theory, and that none of his thorough and thoughtful analysis and conclusions should be accepted by this Court. Regardless, for purposes of determining the motion to dismiss, and accepting the allegations of the Texas Complaint as true, the Special Master considered that groundwater development has occurred in New Mexico since 1938. *See* Report 194-209. The underlying premise of Texas' Complaint is that groundwater (and surface) diversions in New Mexico are unlawfully depleting Project supply. *See* Texas Complaint ¶ 18 ("The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas."). The Special Master did not determine the specific nature and extent of the groundwater pumping (or unlawful surface water diversions)

in New Mexico and the extent of New Mexico's Compact violations. This will be the central issue before the Special Master upon remand of the case for further proceedings.

2. The Special Master's conclusions and recommendations do not implicate *Colorado River* abstention or the McCarran Amendment, and the general stream adjudication in New Mexico remains an inadequate forum to fully resolve claims relating to Rio Grande Project rights.

A fundamental point of confusion for New Mexico and its *amici* is the role of New Mexico state law with regard to the Rio Grande Project and Texas' Compact apportionment. New Mexico does not have the authority, either through a general stream adjudication or through state administration, to determine what Project water is available, if any, to New Mexico below Elephant Butte, and what is obligated to Texas as its Compact apportionment. That issue – identifying Texas' apportionment under the Rio Grande Compact and New Mexico's interference with Texas obtaining its Compact water through the Project – is the central question of this Original Action. And, as Texas' Compact apportionment is part and parcel of the rights of the United States in the Project, the nature and extent of the United States Project right must be determined in this case. Once this Court determines the respective rights of Texas and New Mexico with regard to Texas' Compact apportionment, and rights in and to Project

supply through EPCWID, then and only then does New Mexico have a role in administering the amount of water, if any, within New Mexico's apportionment below Elephant Butte.[9] New Mexico's jurisdiction extends to curtailing the exercise of rights in New Mexico to prevent interference with Project supply to ensure New Mexico's Compact compliance. New Mexico may not unilaterally determine as a matter of state law how much (or how little) Project water crosses the Texas state line for delivery to EPCWID.

New Mexico and its *amici* confuse the original jurisdiction proceeding in this Court with an adjudication of water rights, which it is not. The claims before this Court involve the enforcement of Texas' Compact rights which are directly related to and intertwined with the Rio Grande Project. The rights of the United States in and to the Rio Grande Project are appropriately before this Court, along with Texas' Compact claims, and cannot be decided in a state (or federal) court general stream adjudication. Because of the interrelated nature of the Compact and Project rights,

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[9] NMSU appears to contemplate for the first time that New Mexico groundwater development was necessarily limited after the 1938 Compact. NMSU Brief 6. But that is the only logical conclusion and is specifically pled by the Texas Complaint. *See* Texas Complaint ¶ 10 ("A fundamental purpose of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the time the Rio Grande Compact was executed."). A contrary result, *i.e.*, that development of groundwater in New Mexico could continue unimpeded under state law after the signing of the Compact, would nullify the benefits Texas bargained for and received under the Compact and would not have resolved anything. *See* Report 219.

this Court is the exclusive forum wherein the United States rights' in the Project can be determined as it is the only forum where the State parties to the Compact as well as the United States can be joined. *See* Report 233. This case is not an adjudication of the United States Project water right and will not result in a decree of that water right, but rather determine what the state adjudication court cannot: what amount of the Project water supply must be delivered to Texas and how that right should be protected.

Neither the McCarran Amendment, 43 U.S.C. § 666, nor the abstention doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) ("*Colorado River*"), is relevant here. The McCarran Amendment is a procedural statute providing a limited waiver of the United States' sovereign immunity for the adjudication and subsequent administration of federal law water rights. In *Colorado River*, this Court was asked to address two competing general stream adjudications, one filed in federal court by the United States and the other filed in state court by a state water user. In interpreting the McCarran Amendment, *Colorado River* found that, in the adjudication of water rights, the McCarran Amendment evinced a policy of "unified proceedings" for adjudication of all rights to water within a stream system. *Colorado River*, 424 U.S. at 819. Accordingly, the Court found that the federal court should abstain from proceeding in deference to the ongoing state court action relating to the adjudication of the same water rights. *Id.* at 820-21.

The adjudication of water rights is not at issue here. The United States is not seeking to assert its water rights or to have its Project water rights determined as a water rights claimant. The Complaints in this case raise the respective rights of Texas and New Mexico under the Rio Grande Compact and the United States' interest in the Project as it relates to Texas' Compact apportionment. As the Special Master found, the Project is "the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream. . . ." Report 204. The determination of quantity of and interference with a Compact apportionment is not and never has been within the purview of an adjudication court. Interpretation and enforcement of interstate Compacts is within the exclusive jurisdiction of this Court. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 567 (1963) (Court's original jurisdiction extends to a suit between states to enforce or declare compact rights); Report 216 ("[A]ny question of the rights of any signatory State to water apportioned by the 1938 Compact – including the rights to that portion of water mandated by compact to be delivered to lower New Mexico via the Rio Grande Project – must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court.").

This Court has never viewed its original and exclusive jurisdiction regarding interstate Compact disputes to be obviated by a state general stream adjudication. *See Arizona v. California*, 460 U.S. 605 (1983) (apportioning waters of the Colorado River in original jurisdiction action during pendency of general

stream adjudications on Colorado tributaries, *see Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983)); *see also Montana v. Wyoming*, No. 137 Orig., First Interim Report of the Special Master 15 (Feb. 10, 2010) (intrastate remedies did not preclude Montana from enforcing its rights under the Yellowstone Compact which "requires Wyoming to ensure that new diversions in Wyoming do not prevent sufficient water from reaching the border to enable Montana to satisfy its pre-1950 appropriations"). Nor may a state adjudication court be deemed to be an adequate forum for resolution of interstate stream disputes. A general stream adjudication determines individual claims to ownership of water within a stream system, *see Dugan v. Rank*, 372 U.S. 609, 618 (1963); it is an inadequate forum for resolution of disputes between states as to the apportionment of the waters of a stream pursuant to an interstate compact, which are within this Court's exclusive original jurisdiction.

The New Mexico state court stream adjudication, to which Texas is not a party, U.S. Const. amend. X, and EPCWID is limited to a role as *amicus curiae*, cannot resolve the claims Texas and the United States have raised before the Court. The state court cannot consider Texas' allegations that New Mexico has violated its Compact obligations by depleting Project supply after release from Elephant Butte. Nor can the state court address the claims of the United States against New Mexico for interference with the United States' interests in the Project and obligations to deliver

Texas' Compact water to EPCWID. The New Mexico *amici* argue that water users in New Mexico would be left out in the cold if this Court makes interpretations of the Project rights as those relate to the Compact. NMPG Brief 24; NMSU Brief 31; Las Cruces Brief 37. This is not true. All claimants in the state adjudication will remain entitled to participate in the adjudication of any Project water right for the United States. But the state adjudication cannot interpret and enforce the United States' rights in and to the Project as those rights are intertwined with Texas' Compact right.

New Mexico's *amici* point to the fact that Texas has completed a stream adjudication for the Project water rights of EPCWID and the United States in Texas. NMSU Brief 23; ABCWUA Brief 30; *see* Certificate of Adjudication. What New Mexico and its *amici* fail to acknowledge is that the Texas Certificate of Adjudication specifically recognizes the right of EPCWID and the United States to store, allocate, and release Project water in New Mexico, Certificate of Adjudication, EPCWID Motion to File Complaint Brief App. 10-12, and assumes and relies on New Mexico's compliance with its Compact obligations, thereby allowing 67/155th "of all water stored in Project storage (as defined in the Rio Grande Compact) and legally available for release" to reach the Texas state line and EPCWID, *id.* 10. In contrast, the New Mexico adjudication court has declined to recognize the obligation of the Project to deliver water pursuant to the Texas decree or to recognize that, as a federal Reclamation project, the United States is entitled to seepage and return flow as

part of Project supply. *See* U.S. Brief 18-19. The adjudication court has also deemed that Project water supply which must be delivered to Texas is susceptible to a state law priority date despite the fact that as Compact water that water supply takes priority over all appropriations granted by New Mexico. Report 213; *see Hinderlider*, 304 U.S. at 106. EPCWID does not assert that the state adjudication court may not ultimately adjudicate a water right to the United States. But it cannot do so in derogation of EPCWID's Project rights and the rights of Texas and the United States under the Rio Grande Compact.

The *amici* further err in arguing that this Original Action is akin to the Quiet Title Case brought by the United States in federal district court in New Mexico, *United States v. City of Las Cruces*. Las Cruces Brief 32; NMSU Brief 21. The Quiet Title Case did not involve claims for enforcement and interpretation of the Rio Grande Compact and did not join or involve the signatory states to the Compact. Rather, that case was limited to a request by the United States to declare title with regard to certain waters in the lower Rio Grande in New Mexico. The case specifically did not involve "[t]he question of whether and how Rio Grande water should be apportioned among states." 289 F.3d at 1186. That, however, is exactly what is before this Court. Moreover, New Mexico and its *amici* neglect to mention that the Tenth Circuit did not affirm the dismissal of the Quiet Title Case. Rather, the Tenth Circuit remanded the case directing the district court consider the propriety of a stay under *Brillhart v.*

Excess Insurance Co. of America, 316 U.S. 491 (1942). *City of Las Cruces*, 289 F.3d at 1192-93. Following remand, the district court ordered that "this case is hereby stayed . . . [and] should further proceedings become necessary or desirable during the pendency of the water adjudications in New Mexico and Texas, any party may initiate proceedings." *United States v. Elephant Butte Irrigation Dist.*, 97-cv-00803 JAP-RLP (Aug. 15, 2002). While the United States has not moved to lift that stay, this case, in which both Texas and the United States allege violations of the Compact and the Rio Grande Project Act, indicates the day has come for this Court to address the claims of Texas and the United States, which are not amenable to resolution in the state adjudication court.

3. New Mexico and its *amici* misunderstand and fundamentally mischaracterize the Operating Agreement.

The Project currently is operated in accordance with the Operating Agreement, parties to which are the Bureau of Reclamation, EPCWID, and EBID. The Operating Agreement was part of the settlement of litigation among the Districts and the United States in which EPCWID filed suit to require the United States to properly account for and allocate Project water to EPCWID, EBID, and, pursuant to the 1906 Treaty, Mexico. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation District*, EP07CA0027 (W.D. Tex. Jan. 22, 2007). The Operating Agreement has

served since 2008 as the basis for Project operations. The Operating Agreement remains essential to the proper allocation of Project water and is a binding agreement as among the United States, EBID, and EPCWID. *See* U.S. Brief 11-12.

One of the key provisions of the Operating Agreement is allocation procedures that compensate EPCWID for unauthorized diversion of Project water in New Mexico, including groundwater pumping that captures Project water conveyed in the Rio Grande and the return flow of Project water conveyed by Project drainage system. Operating Agreement § 2.5. The allocation procedures are based on a compromise of the Operating Agreement parties as an alternative to the curtailment of all pumping of post-1938 wells that capture Project water. The compromise embodied in the allocation procedures provides that EPCWID surface water allocation is based on the Project conditions measured between 1951 and 1978. Any Project water captured by groundwater pumping or increased consumptive use in New Mexico in excess of the 1951-1978 conditions reduces EBID Project water allocations. This effectively allows New Mexico water users below Elephant Butte to enjoy the same combined amount of groundwater pumping and Project water use as occurred between 1951 and 1978. In effect, EBID repays EPCWID for its portion in excess of the 1951-1978 conditions of unauthorized Project water captured, diverted, and/or consumed by New Mexico water users.

The allocation procedures of the Operating Agreement are a compromise and settlement in lieu of ensuring Project (and thereby Compact) water deliveries to Texas based on the conditions negotiated under the 1938 Compact. The number of wells in existence in 1938 was small; even by 1946, only 11 irrigation wells were in operation in the Rincon and Mesilla Valleys. *See* Ground-Water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico, Geological Survey Paper 1230 (1954) 107.[10] By 1964, however, over 1,000 irrigation wells had been drilled, and pumped an estimated 207,434 acre feet. *See* Water Resources of the Rincon and Mesilla Valleys and Adjacent Areas, New Mexico, New Mexico State Engineer Technical Report 43 (1981) 80.[11] The difference between the Operating Agreement compromise and the 1938 conditions detailed in Texas' Complaint is very significant in terms of the amount of Project water diverted in New Mexico for non-Project uses.[12] In economic terms this amounts to hundreds of millions, perhaps billions, of dollars of benefit to New Mexico since 1938 and continuing into the future if not corrected by the Court.

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[10] Available at https://pubs.usgs.gov/wsp/1230/report.pdf.

[11] Available at http://www.ose.state.nm.us/Pub/TechnicalReports/TechReport-043.pdf.

[12] The 1951-1978 conditions embodied in the Operating Agreement also include Texas groundwater pumping (the Canutillo well field) and the effects of that groundwater pumping on Project surface flows.

Yet, New Mexico amazingly and erroneously claims the Operating Agreement is inequitable to New Mexico and radically alters historic project water allocations. New Mexico Brief 10. The New Mexico *amici* either fail to understand or deliberately mischaracterize the Operating Agreement, claiming the Agreement has "led to drastic reductions in . . . surface supplies" to EBID farmers, NMPG Brief 2; and that under the Operating Agreement "New Mexico has received much less than 57% of the surface water than was originally allocated." Las Cruces Brief 24. But New Mexico and its *amici* provide no factual basis for these claims, as there is none. They fail to inform the Court that the share of Project water (including both surface water diversions, groundwater capture, and increases in consumptive use) enjoyed by New Mexico under the Operating Agreement is greater than the amount New Mexico received under the 1938 Compact conditions, prior to large scale groundwater development and the conversion of New Mexico's irrigated land from low water use crops like cotton to high water use crops like pecans.

It is EPCWID and Texas that have suffered for years as a result of the inability of the Project to deliver EPCWID's rightful allocation of Project water (and thus Texas' rightful allocation of Compact water) due to New Mexico groundwater pumping. It is EPCWID and EBID that, along with the United States, reached a settlement to address historic over-deliveries of Project water to New Mexico caused by groundwater capture and increased consumptive use in New Mexico. As

the record is further developed in this case, Texas and EPCWID will show that the Operating Agreement, far from what New Mexico and the New Mexico *amici* erroneously describe, has and continues to greatly benefit New Mexico while limiting the harm caused by New Mexico to Texas. If the Operating Agreement were no longer in effect, EPCWID agrees with Texas that the Compact requires deliveries to EPCWID through the Project to be based on the conditions in effect at the execution of the Compact in 1938. *See* Texas Complaint ¶¶ 18-19.

4. The U.S. Complaint states claims under the Rio Grande Compact based on the interrelated nature of the Rio Grande Project and the Compact, but not because the United States has unilateral operational control of the Project.

The U.S. Complaint states a claim for both Compact violations and violations of Reclamation law, but not because the United States unilaterally controls or operates the Rio Grande Project. The Special Master found that the Compact rights of Texas are intertwined with the Project. Report 201-02, 209. Yet, the Special Master erroneously concluded that the United States did not state a claim under the Rio Grande Compact because it is not a party to, and has no apportionment under, the Compact. Report 231. As the United States argues in its exceptions, "the Compact protects the water that is released from the Project in order for it to reach its intended destination." U.S. Brief 29. The

United States may seek relief against New Mexico to protect the operation of the Project and its contractual obligations to deliver water to EBID and EPCWID. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981); U.S. Brief 39-40.

EPCWID supports the exception of the United States that the U.S. Complaint states a claim for relief under the 1938 Compact, with one important qualification: the U.S. Brief appears to claim that the United States, and only the United States, is responsible for operation of the Rio Grande Project. U.S. Brief 11, 40. This is not true. Since the inception of the Project, as exemplified in the 1938 contract, the Certificate of Adjudication, the Title Transfer, and the Operating Agreement, EPCWID, together with EBID, has an integral role in Project operations and works jointly with the United States to operate the Project, including allocation, release and delivery of Project water. Additionally, pursuant to a Joint Powers Agreement, EBID and EPCWID jointly operate Project works which cross and re-cross the Texas-New Mexico state line to effectuate delivery of water to Project water users in both states and districts. *See* EPCWID Reply in Support of Motion to Intervene (July 10, 2015), App. 9-21.

The Special Master appears to have misunderstood the practical and legal relationships crucial to operation of the Project when he concluded "[i]t is the United States that owns and operates the Project's primary dams and storage facilities and determines how water is released and allocated between EBID and EP No. 1 [EPCWID] pursuant to the Rio Grande Project."

Report 273. This conclusion is incorrect. While the United States has an interest in the Rio Grande Project and protecting its obligations to deliver Texas' Compact water to EPCWID, this interest is not based on superintending or unilateral control of the Project by the United States. The Texas Certificate of Adjudication provides that EPCWID is the part owner of the Project right, which includes a right of storage and release in New Mexico for delivery and use by EPCWID. *See* Certificate of Adjudication, App. 10-11. The Operating Agreement, which forms the basis for the current operation of the Project, is reliant on the Allocation Committee, comprised of a representative from each of the Districts and from Reclamation. The operating manual, which is the guts of the Operating Agreement, can only be changed by agreement among the United States, EBID, and EPCWID. Moreover, as a result of the Title Transfer, EPCWID owns and operates the Project distribution and drainage facilities in Texas as well as cross-border facilities in New Mexico pursuant to the Joint Powers Agreement with EBID.

The United States works together with the irrigation districts, not unilaterally, in operation of the Project, and EPCWID does not support the United States' exception to the extent the United States makes any assertion to the contrary.

CONCLUSION

The Special Master's Report should be adopted with respect to the recommendation that New Mexico's motion to dismiss Texas' Complaint be denied and to the recommendation that New Mexico's motion to dismiss the U.S. Complaint's claims under federal Reclamation law be denied. The Report should not be adopted with respect to the recommendation that New Mexico's motion to dismiss the U.S. Complaint's Compact claims be granted. The Court should order all claims asserted by Texas and the United States to proceed before the Special Master.

Respectfully submitted,

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